Supreme Court, U.S.
FILE
DEC 11
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-767

UNITED STATES OF AMERICA,
Appellant,
v.
THE CONNECTICUT NATIONAL BANK, THE FIRST NEW HAVEN NATIONAL BANK, and JAMES E. SMITH, Comptroller of the Currency,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

MOTION TO AFFIRM

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December, 1973

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MOTION TO AFFIRM

Pursuant to Rule 16(c) of the Rules of this Court, appellees, The Connecticut National Bank and The First New Haven National Bank, move that the judgment of the District Court, reported at 362 F. Supp. 240, be affirmed.

Restatement of the Question Presented

Whether plenary review is warranted in a potential competition case when no grounds are presented for disturbing the District Court's findings of fact or conclusions drawn therefrom.

Restatement of the Case

CONNECTICUT BANKING STRUCTURE

Banking in the State of Connecticut is highly competitive. Rather than a trend toward concentration, Connecticut is experiencing a significant increase in the number of banking alternatives available to the public. The number of Connecticut commercial banks at November 1972 (64) was the same as at year-end 1963 (GX-90; DX-71, DX-72).[1] Since November 1972 six new commercial banks have been organized in Connecticut and there now are more commercial banks in Connecticut than there were in 1963 (*cf.* n. 7, J.S. 6). Connecticut residents who commute to New York and medium and larger sized Connecticut business customers have banking alternatives which include the nation's largest banks with offices in New York City and in Westchester County adjacent to Connecticut. Six New York City banks alone drew over $483 million in deposits from Connecticut in over 23,000 accounts during 1972 (DX-60; J.S. 26a). Furthermore, by year-end 1975 most of the 68 Connecticut savings banks and their 229 offices will provide additional banking alternatives offering a full range of services, including checking accounts, to Connecticut retail customers (DX-52, p. 13, Table 5; DX-94).[2]

1. The abbreviations used herein are as follows: "GX" for appellant's exhibits; "DX" for appellee banks' exhibits; "Tr." for transcripts of proceedings below; "J.S." for appellant's Jurisdictional Statement; and "Marine J.S." for appellant's Jurisdictional Statement in *United States* v. *Marine Bancorporation, Inc. et al.*, No. 73-38.

2. The new Connecticut legislation according savings banks power to offer personal checking accounts provides that such power may be exercised by savings banks in all towns except those of less than 25,000 population in which the head office of a commercial bank with assets of less than $50 million is located. Even in these towns savings banks may offer personal checking accounts in the circumstances described in Section 8(b) and (c), Public Act No. 73-195.

Connecticut savings banks now offer a full range of retail banking services other than checking accounts, including personal loans.

The number of commercial banking alternatives available to those customers, such as small business enterprises and individuals whose banking options are the most highly localized, has increased dramatically from 1955 to 1971 (DX-4).

Of the 169 towns in Connecticut, there have been increases in the number of commercial banking alternatives since 1955 in 107. There has been no change in 60 towns and there have been decreases in only two towns in the period from 1955 to 1971 (Tr. 1525-6; DX-4). In 20 of the 23 Fairfield County towns where Connecticut National Bank has most of its offices, there are more commercial banking alternatives available today than there were in 1955 and in no town are there less alternatives than there were in 1955 (Tr. 1524; DX-4). In 23 of the 27 New Haven County towns where First New Haven National Bank has all of its offices there are more commercial banking alternatives today than there were in 1955, while in only one, the City of New Haven, has there been a decrease during the same period (Tr. 1524-5; DX-41).

The two largest banks in the state, Connecticut Bank and Trust Company ("CBT") and Hartford National Bank and Trust Company ("Hartford National"), were the two most likely entrants into the City of New Haven under appellant's theories during the period 1955-1971. If these two banks had entered New Haven *de novo* rather than by acquisitions (which were not opposed by appellant), there would have been no decline in the number of commercial banking alternatives in New Haven during that period.

The proposed merger will result in no change in banking alternatives available in either New Haven or Bridgeport (Tr. 1525).

Among the 119 towns in Connecticut outside Fairfield and New Haven Counties, there has been an increase in the number of banking alternatives in 64 of such towns and a decrease in only one, while in the 54 remaining towns no change occurred from 1955 to 1971 (Tr. 1525; DX-4). Appellant's banking economist, Dr. Neil B. Murphy, agreed that between 1955 and 1971 banking in Connecticut has become more competitive.[3]

Until 1933, branch banking was not permitted in Connecticut. In that year, the Connecticut legislature authorized branching on a limited scale. Connecticut's branching laws prohibit any bank from branching into any town which is the head office town of any other bank.

By 1969 the two far larger Hartford banks, CBT and Hartford National, had begun to branch outside the Hartford area[4] (J.S. 8a-9a). These two Hartford headquartered banks dominate banking in the state. Together they held 39% of the deposits held by commercial banks with offices in Connecticut in 1970 (J.S. 42a). By year-end 1972 together they held 41.3% (DX-93) and have made nine acquisitions since 1960 without opposition by appellant (GX-72). Both are now statewide banks. With the exception of Union Trust Company, the state's third largest commercial bank, all other banks in Connecticut are still confined to the same general areas where they were situated in

3. "The Court. Do you think between 1955 and 1971 despite the decrease in the number of banks, . . . Connecticut as a whole has become more competitive in banking?
A. Yes" (Tr. 406; J.S. 94a).

4. CBT and Hartford National had deposits at year-end 1969 of $844 million and $838 million, respectively. Appellees, Connecticut National and First New Haven, had deposits at the same date of $336 million and $234 million. By year-end 1972, CBT and Hartford National both had deposits over $1.3 billion, while Connecticut National and First New Haven had $412 million and $272 million (DX-69; GX-121, p. 12, GX-119, p. 6; DX-93).

the 1950's. The resulting banking structure thus consists of two dominant statewide banks based in Hartford, one bank with offices from Greenwich on the New York border to New London on the Rhode Island border in the southern portion of the state and a number of smaller regional and local banks. Only Hartford, among Connecticut's five leading cities, is the headquarters site of banks represented in virtually all of the state's leading business centers, including Bridgeport, New Haven, Stamford and New London. No bank from these towns has been able to enter Hartford which is one of the most highly concentrated banking areas in the country (Tr. 1292). Appellant's enforcement policies threaten to perpetuate that imbalance.

To the extent that there has been any increase in concentration of deposits among Connecticut banks, or among Connecticut commercial banks alone, since 1959, virtually all of the increase is accounted for by the two dominant Hartford banks and by two savings banks, all substantially larger than appellees (DX-8; DX-9; DX-10; DX-13).

The combined share of all deposits in Connecticut commercial banks held by CBT and Hartford National has steadily increased from 34.5% in 1959 to 41.3% in 1972 (J.S. 42a; DX-93). The share of such deposits held by the next six largest commercial banks combined during the period 1959-1971 increased in some years and decreased in other years, as one would expect in a competitive environment, with a net increase of only 1.2% from 35.8% to 37.0% (DX-13). In the ten years from 1961 to 1971, Hartford National added $36.3 million to its capital accounts, while CBT added $41.8 million. These *increments* alone are each substantially larger than the *total* capital of either Connecticut National or First New Haven (Tr. 928; DX-14; DX-15). In the one year period September 30, 1971 to September 30, 1972, CBT and Hartford National increased their total assets by $183

million and $196 million, respectively. Each of these *increases* is almost equivalent to the *total* assets of the state's tenth largest commercial bank, Second New Haven Bank, which had $219 million at September 30, 1972 (DX-76). The combined *increases* in assets gained in *one year* by the two Hartford banks almost equal the *total* assets of Connecticut National and exceed the *total* assets of First New Haven (J.S. 9a). The combined *additional* deposits obtained by the Hartford banks, CBT and Hartford National, from December 31, 1969 to September 30, 1972 ($745.3 million) exceeded the combined *total* deposits of appellee banks at September 30, 1972 ($672.8 million) (J.S. 45a; Tr. 1526; DX-69).

For the one year ended December 31, 1972, the two Hartford banks increased their combined deposits by about $580 million. Thus CBT increased its share of deposits of commercial banks headquartered in Connecticut from 19.1% in 1971 to 20.9% in 1972, while Hartford National increased its share from 18.8% to 20.4%. During this same period, Connecticut National's share decreased from 6.5% to 6.2%, while First New Haven declined from 4.7% to 4.1% (DX-93).

Savings banks have traditionally accepted personal savings deposits and made loans secured by real property. Connecticut savings banks have important additional powers which savings banks in other states do not have (Tr. 1007). Connecticut savings banks are empowered to make personal loans up to $5,000 repayable in monthly installments. Savings banks may lend up to 8% of their total assets in personal loans (Tr. 147, 212, 730). At September 30, 1972 total assets of Connecticut savings banks were about $7.2 billion. Accordingly, at that date about $576 million were available at Connecticut savings banks for personal loans (Tr. 730). Appellant's banking expert

agreed that mutual savings banks in Connecticut are a reasonable substitute for commercial banks for borrowers seeking personal loans for a wide variety of purposes up to $5,000 (Tr. 214).

Unlike most other states, savings banks in Connecticut have more deposits than the commercial banks. As of year-end 1971 savings banks had $6.1 billion in deposits, while commercial banks accounted for $5.7 billion (DX-62; GX-70).[5]

By December 31, 1975, savings banks in Connecticut will have the power to accept demand deposits in non-interest bearing personal checking accounts, and it is likely that savings banks will seek legislation enabling them to offer an even greater range of services (J.S. 17a-18a; Tr. 1648, 1764).

THE PARTIES

First New Haven National Bank had $272.4 million in deposits at year-end 1972, ranking thirteenth among all banks headquartered in Connecticut and eighth among commercial banks (J.S. 3a-4a).[6]

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5. As shown in DX-63, the percentage share of total savings held by Connecticut savings and commercial banks fluctuated during the five years prior to trial as follows:

Year-end	Savings Banks	Commercial Banks
1967	58.9	22.2
1968	58.2	23.2
1969	59.2	22.2
1970	59.0	22.5
1971	59.7	21.8

6 According to the *Annual Report of the Bank Commissioner of the State of Connecticut*, March 6, 1973, pp. 108-109, there were five savings banks with total deposits at December 31, 1972 larger than First New Haven and two savings banks with deposits larger than Connecticut National. Thus, the actual rankings of First New Haven and Connecticut National at year-end 1972 were thirteenth and sixth among all Connecticut banks.

First New Haven ranked fourth in deposits with $266 million at year-end 1971 among commercial banks with offices competing in the City of New Haven behind Hartford National ($1.1 billion), CBT ($1.1 billion) and Union Trust Company ($530 million) (J.S. 43a; GX-70). Two savings banks in New Haven also exceeded it in size. It thus ranked sixth among all banks which have offices in New Haven. At year-end 1971 there were nine commercial banks and six savings banks headquartered in Connecticut with total deposits over $200 million (GX-70; DX-52, p. 15). First New Haven operates 22 offices, all in New Haven County (J.S. 4a).

Connecticut National, with $412.2 million in deposits at year-end 1972, ranked sixth among all banks headquartered in Connecticut and fourth among commercial banks (J.S. 3a).[7] Connecticut National operates 51 offices of which 41 are located in Fairfield County adjoining Westchester County in New York (J.S. 3a).

At year-end 1971, Connecticut National, with $375 million in deposits, was the third largest of the Connecticut-headquartered commercial banks competing through offices located in Bridgeport, and the fifth largest in Fairfield County, ranking behind CBT and State National Bank of Connecticut ($380 million) in Bridgeport and Hartford National and Union Trust Company in Fairfield County (GX-70; GX-72). In Bridgeport, People's Savings Bank had 1971 deposits of $721 million, nearly twice the size of Connecticut National's 1971 deposits (DX-52, p. 15; GX-70). Connecticut National faces substantial competition from many of the largest banks in the Nation located in New York and Westchester County (J.S. 25a, 41a-42a).

The merging banks' combined share of total deposits of Connecticut-headquartered banks has decreased from 6.8%

7. See note 6, *supra*.

in 1959 to 5.9% in 1970 (DX-9), while their share of total deposits held by Connecticut commercial banks decreased during the same period from 13.8% to 11.6% and decreased further by year-end 1972 to 10.3% (DX-17; DX-93). The combined banks' share of deposits held at year-end 1971 by Connecticut-headquartered commercial banks amounted to 9.68%, when reduced by the deposits derived from Connecticut by only six New York City and four Boston-headquartered banks[8] and by the deposits in the offices of the merging banks to be divested as required by the order of the court below (J.S. 104a-105a). Applying the same reduction factors to reflect the *proven* banking business originated in Connecticut by the six New York and four Boston banks, the combined shares of commercial bank deposits held by appellees would be approximately 8.8% and approximately half that with respect to all Connecticut bank deposits, including savings banks.

ARGUMENT

Appellant asserts that the questions presented here are whether Section 7 of the Clayton Act (15 U.S.C. 18) has been violated "by eliminating the two banks as significant potential entrants into each other's markets in Bridgeport and New Haven and into other local banking markets in Connecticut" and "by stimulating other mergers and by intensifying the trend toward banking concentration in the state as a whole" (J.S. 2). The question whether the two banks are "significant potential entrants into each other's

8. The Connecticut deposits of the six New York City and four Boston banks reflected in the Report of the Special Master (DX-60) are well under the totals actually derived from the state, as that Report establishes. The competitive impact of these banks which have aggregate assets well in excess of $80 billion, over thirteen times the total assets of all commercial banks in Connecticut, is self-evident.

markets" is, of course, a question of fact which was determined by the District Court adversely to appellant. Appellant's proof on the subject was limited to (a) charts showing *de novo* branching and merging histories of appellees and other commercial banks in Connecticut, (b) evidence that certain standard metropolitan statistical areas ("SMSA's") in Connecticut have enjoyed good overall economic growth (although a number of central cities including Bridgeport and New Haven were stagnant or worse),[9] and (c) testimony of an expert witness regarding the criteria used by economists to rank the significance of potential entrants, and the application of such criteria to this case.

The question whether the banks' "markets in Bridgeport and New Haven" were correctly determined by the District Court when it rejected appellant's contention that the nine SMSA's in Connecticut were *ipso facto* banking markets, in conformity with this Court's similar rejection in *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963), *United States* v. *Phillipsburg National Bank*, 399 U.S. 350 (1970), and *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962), is also a question of fact determined adversely to appellant whose evidence was limited on this issue to testimony as to how SMSA's are constructed by the Office of Management and Budget.

Appellant's contention that the merging banks were significant potential competitors in "other local banking markets in Connecticut" is also an issue susceptible to proof by testimonial or documentary evidence. Appellant's failure of proof on this issue was virtually total. Appellees,

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9 Bridgeport's population declined from 1960-1970, while total employment increased only 3.4% in contrast to the state as a whole which realized population growth of 19.6% and an increase in total employment of 25%. New Haven's population declined 9.4% and total employment 9.5%. Manufacturing employment decreased 25.3% from 1963-1967 (DX-28; DX-29; Tr. 1262, 1272-3).

on the other hand, introduced a detailed objective study of the structure of potential competition in the state prepared under the direction of Dr. Merton J. Peck, Chairman of the Economics Department of Yale University, which concluded that the merger would not adversely affect potential competition. The District Court accepted Dr. Peck's study and testimony and rejected appellant's fragmentary proof (J.S. 28a). Appellant is asking this Court to make new findings of fact on each of these issues based largely on rhetoric.

Finally, appellant's characterization of the issues presented argues that this merger will stimulate other mergers and increase concentration in the state when the record establishes, and the District Court found, that the only significant increase in concentration resulted from growth by the two large Hartford banks which appellant has permitted to make nine acquisitions since 1960. Appellees' share of the state banking market has decreased. The appellant's unique statutory authority, 12 U.S.C. 1828(c)(7)(A), to obtain an automatic preliminary injunction makes virtually certain that no anticompetitive merger can be consummated without appellant's acquiescence (J.S. 101a).

Contrary to appellant's argument, this case does *not* present "important legal issues . . . involving bank mergers that eliminate potential competition in commercial banking" (J.S. 12). The District Court correctly analyzed and followed this Court's decisions in *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526 (1973), *United States* v. *Penn-Olin Co.*, 378 U.S. 158 (1964) and *F.T.C.* v. *Procter & Gamble Co.*, 386 U.S. 568 (1967). The District Court agreed that "The concept of potential competition is, of course, a valid one" (J.S. 98a). In applying this Court's decisions

the District Court simply found that appellant's evidence did not support its theories.

Affirmance of the District Court's decision will not have any significant adverse impact on the Antitrust Division's ability to enforce the antitrust laws. This Court's decisions in *Falstaff, Penn-Olin* and *Procter & Gamble* have established the opportunity of the Department of Justice to prove that the elimination of potential competition may have the effects proscribed by Section 7 of the Clayton Act. Successful utilization of this opportunity, however, requires evidence which appellant, despite diligent efforts, was unable to adduce.

The issues in this case are not "closely related to those in *United States* v. *Marine Bancorporation, Inc., et al.*, No. 73-38, in which the Court noted probable jurisdiction on October 15, 1973" (J.S. 12, 13). As appellant admits, this case presents "a different factual context" (J.S. 13). In the *Marine* case, according to appellant's Jurisdictional Statement, the acquisition being challenged is by "the second largest banking organization" in the state with "total deposits of $1.6 billion (22.8 percent of total deposits held by Washington commercial banks) . . ." (Marine J.S. 7). Here the larger of the two banks ranks fourth with deposits of $412.2 million, representing, even according to appellant, only "6.2 percent of deposits of commercial banks in Connecticut" (J.S. 7-8).

In the State of Washington no other competing system of financial institutions will offer a full range of retail banking services within the next two years.

In the *Marine* case the size of the smaller bank "had increased by 50 percent" in the "five years preceding this merger" (Marine J.S. 6). First New Haven's size has changed only from $222 million to $272 million in the past five years and its share of deposits held by Connecticut-

based commercial banks decreased from 5.5% in 1966 to 4.1% in 1972.[10]

In *Marine* the District Judge announced his decision from the bench after trial and "adopted, without change, the defendant's proposed findings of fact and conclusions of law" (Marine J.S. 10). This Court has had occasion to note that "mechanically adopted" findings ". . . do not reveal the discerning line for decision of the basic issue in the case." *United States* v. *El Paso Gas Co.*, 376 U.S. 651, 657 (1964).

In conformity with that view, Judge Zampano in Connecticut requested proposed findings of fact from all parties and issued carefully detailed findings six months after the trial which are clearly the product of careful judicial deliberation and can in no way be characterized as the wholesale adoption of findings proposed by either side.

Appellant contends that in the State of Washington "the sponsored bank procedure has become an established method by which national banks enter new markets in Washington" (Marine J.S. 9).

In the State of Connecticut no such entry has ever occurred or been attempted.

Appellant contends in *Marine* that The National Bank of Commerce (NBC) could have entered Spokane by "acquisition of a smaller 'foothold' bank." There is no "foothold" or even "toehold" bank in the City of New Haven to be acquired by Connecticut National. First New Haven, with decreased earnings and continued losses on nine of its branches, is in no position to acquire The Lafayette Bank & Trust Co. in Bridgeport. James Staples & Co., a private banker in Bridgeport with deposits of $2.1 million (GX-65), would not even be a "toenailhold" means of entry into Bridgeport.

10. Computed from GX-120, p. 12 and DX-12; DX-93.

NBC does not compete with two banks over three times larger throughout its service area as do both Connecticut National and First New Haven.

In the *Marine* case, "The experts on both sides agreed that Spokane is growing" (Marine J.S. 17). Both Bridgeport and New Haven have experienced declining business and residential population (J.S. 34a-35a).

In the *Marine* case there was "objective evidence which established that NBC was perceived by other banks in Spokane as a potential competitor and as such exerted a 'beneficial influence on competitive conditions in that market'" (Marine J.S. 19). NBC also had a "longstanding and conceded" interest in entering Spokane (Marine J.S. 17). NBC was "one of only two institutions capable of entering Spokane *de novo* or by foothold acquisition" (Marine J.S. 21).

There was no such "objective evidence" in this case. The evidence presented was to the contrary. In Connecticut there would remain four commercial banks capable of entering New Haven and five capable of entering Bridgeport by appellant's standards (J.S. 33a, 35a). Appellant was not unaware of the importance of such evidence (See *Falstaff, supra*). The reason that appellant could not obtain such "objective evidence" in this case, despite ample opportunity to do so, is because the evidence did not exist.

The record in the *Marine* case showed "that the highly concentrated Spokane market was marked by interdependent behavior in an atmosphere of friendly cooperation rather than vigorous price and service competition" and that there were "specific instances of cooperation between competitors in such matters as rates and service charges . . .", as well as other specific evidence of anticompetitive behavior (Marine J.S. 20). Again no such evidence was introduced in this case because appellant could not obtain it.

Thus the reasons which led this Court to note probable jurisdiction in the *Marine* case simply are not present here. Summary affirmance of the District Court's decision here is, in appellees' view, clearly appropriate.

POTENTIAL COMPETITION

Appellant failed in its burden to establish that appellees were reasonably likely to become engaged in substantial competition in the future or that the loss of either bank as a potential entrant into other areas of Connecticut has any actual or perceived impact on the market place. Appellant did not even attempt to show that either defendant presently projects a significant competitive influence from the fringe of the areas presently served through the threat of entry—actual or perceived. Appellant's entire proof on the "wings effect" consisted of two paragraphs stating the theory, with no application to the facts of this case.[11]

The first two elements of the appellant's case, the banks' expansion history since 1955 and the record of economic growth in Connecticut, are at least as probative of the opposite conclusion as of the proposition that Connecticut

11. "Q. . . . is there another beneficial effect which is related to potential competition? A. Yes. In general, we think in terms of a—if a concentrated market exists with a strong potential competitor capable of entering, that in these cases the participants in the concentrated markets may find it to their advantage not to exercise their market power. That is, the threat of an entrant in the so-called —in the wings, the wings effect, could conceivably affect their behavior in such a way that they may have—[the] outcome would be more like a less concentrated market.

Q. You are saying that the mere existence of this potential competitor has some effect? A. Yes, it could have some effect. Right" (Tr. 207).

See also, Tr. 556-557:

> ". . . a competitor in the wings will tend to have a desirable effect, within a market area, within some market area, if it's not presently operating there."

National and First New Haven are likely to become substantial competitors in the future. Neither bank has entered the other's home office town nor have they entered "other local banking markets in Connecticut" in competition with each other ouside the New Haven and Bridgeport areas.

Appellant offered no evidence to support the view that either bank has been "waiting anxiously to enter an oligopolistic market", *Penn-Olin, supra,* 378 U.S. at 174, or that either defendant "was so positioned on the edge of the market that it exerted beneficial influence on competitive conditions in that market." *Falstaff, supra,* 410 U.S. at 532-33. If remand were ordered by this Court to reassess the conclusions regarding potential competition reached by the District Court, as requested by appellant, there is no factual basis in the record to decide in favor of appellant on either question. The District Court would be at a loss to reassess the supposed evidence of influence exerted on "the edge" of the market, since there is no evidence to reassess.

In fact, as the District Court found, a closer analysis of appellee banks' expansion history reveals strong objective evidence motivating against significant future *de novo* branch expansion. Connecticut National opened 15 *de novo* branches from 1961 to 1965. In the next five years the bank opened only five offices and the profitability of the bank in terms of return on investment increased by 30% (J.S. 46a). This objective evidence counsels against the statewide branching program in which appellant would have appellees engage. Moreover, this five-year branch expansion rate was the lowest among the nine largest Connecticut commercial banks (J.S. 46a).

Uncontroverted is the evidence that First New Haven opened nine *de novo* offices since 1963, of which five are in the City of New Haven (GX-73); that in 1971 nine of the

bank's twenty-two offices were still showing operating losses aggregating $535,000 per year (J.S. 51a); and that the average cost of a new branch office has steadily risen over the past decade to about $300,000 today (J.S. 47a, 51a).

The evidence is clear (J.S. 46a) that attractive branching sites have become fewer and that the ratio of population to existing banking offices is not sufficient in the towns in question to support viable new branches.

First New Haven's net income for the six months ended June 30, 1973 ($1,108,793) decreased more than 14% from the comparable period in 1972 ($1,300,549).[12] The banks' capacity and motivation to embark on important new branching programs were examined in depth at the trial, and, in objective terms, the District Court found appellant's theories were unsubstantiated (J.S. 46a-51a). These findings are not clearly erroneous.

The banks are not free of their own will to expand geographically into areas served by other banks. No *de novo* branch may be opened by either defendant (outside its own head office city) in any city or town in which another commercial bank is headquartered.[13] Such towns, including all the major urban centers of the state, are "closed" by law to *de novo* branching. Appellant argues, nevertheless, that a less anticompetitive ("toehold") entry into such towns can be gained by a resourceful bank by one of two alternative means: (a) by merging with an existing small bank in the closed town, or (b) by forming a holding company, causing it to charter a new bank and affiliating with it.

In New Haven no such toehold exists or was shown to be likely to exist. In Bridgeport the mere existence of The

12. *Moody's Bank & Finance*, Supp., July 20, 1973, at 1602. This decrease is not surprising in view of the entry of the state's largest two banks into New Haven in competition with First New Haven.

13. Conn. Gen. Stat. Section 36-59, as amended; 12 U.S.C. Section 36(c)(1).

Lafayette Bank & Trust Co., a $50 million institution, and James Staples & Co., a private banker, does not lead to the conclusion that they provide likely means of alternative entry into Bridgeport for First New Haven. As the District Court found (J.S. 34a), where only two or three possible sellers exist as a means of entry, the premium that a selling bank can extract tends to discourage merger (Tr. 1261). Moreover, First New Haven is fighting to retain its business in New Haven against the state's three largest banks, two of which are over five times its size. Its stated intentions not to enter Bridgeport are highly credible in view of this threat to its primary service area and in view of its unimpressive growth and profit rates in the past three years. It is simply in no position to pay a premium to enter Bridgeport and Fairfield County where it would encounter the state's five largest banks as competitors.

The court below recognized that testimony of the banks' officers on this subject was "certainly not the last word . . ." (see *Falstaff, supra*), but went on to note that "no reason has been advanced for doubting their credibility" (J.S. 99a).

In evaluating the market impact of chartering a new bank in a closed town by an existing bank, and how such a hypothetical event is "perceived" by those in the market, it is significant that no bank in Connecticut has ever attempted it. The District Court found that the State of Connecticut does not permit the chartering of a new bank for the purpose of sale to a holding company (J.S. 57a). Between 1962 and October, 1972, 32 applications were filed for new state charters, of which 17 were approved, 10 disapproved and no action taken on the balance (DX-71).[14]

14. The new bank chartered in Bridgeport after trial, referred to in note 43 (J.S. 28) by appellant is subject to the proscription in the Connecticut State Banking Department's new charter application (DX-7) that:

None of these newly chartered banks was organized by a holding company. The Comptroller approved only three of the 25 applications for new charters in Connecticut filed from 1963 to the date of trial (DX-72; 1674-1677). Two of the three were actually "interim" (or "phantom") banks formed by United Bank and Trust Co., a Hartford based bank, and CBT to facilitate acquisitions of existing banks.[15] The only new operating national bank was chartered in 1972 in Stamford with initial capital of $2 million. On July 24, 1973, after the trial, the Comptroller gave preliminary approval to a new charter in the town of Fairfield, requiring initial paid-in-capital of $2.5 million, the same amount required by the State Banking Department for the new charter approved in Trumbull after trial. Of four other state applications made in 1973, three are pending and one has been disapproved in Windsor Locks.[16]

Out of over 60 new charter applications filed and 20 approved in the past ten years by state and federal banking agencies, none has been by existing banks or holding companies to gain new entry. The state, moreover, has made it clear that it will not permit any new bank to be formed for the purpose of sale to an existing banking organization (Tr. 2156) and no bank in Connecticut has attempted to use this route as a means of entry into "closed" towns.[17]

"This proposed bank is not to be organized for the purpose of selling to, merging or consolidating with any state bank and trust company or national bank now in existence."

15. See, e.g., 38 Fed. Reg. 3118 (Feb. 1, 1973).

16. The three applications pending are in the Towns of Clinton, Hartford and New Milford. Towns newly *closed* to *de novo* branching by approvals of new charters since November 1972 include Trumbull, Monroe, Fairfield, Shelton and Ridgefield. *Cf.* n. 7 (J.S. 6).

17. Legal barriers were cited by one witness as the reason. (Tr. 1695) *Cf. Whitney National Bank* v. *Bank of New Orleans & Trust Co.*, 323 F. 2d 290 (D.C. Cir. 1963), *rev'd on procedural grounds*, 379 U.S. 411 (1965).

All of these obstacles apply even if a bank should determine that the substantial capital costs involved in these modes of entry will be incurred to the exclusion of other competing demands for capital investment in the bank's operation that are predictably more profitable.

These legal, regulatory and financial obstacles are high "barriers to entry" and the higher the barriers, the less significant is the influence of potential entry on the behavior of competitors already in an area protected by the barriers. Put simply, the competitors already present in a "closed" city, such as New Haven, do not take seriously the prospect that a Bridgeport bank will somehow climb the barriers, since there are no small, "toehold" banks headquartered in New Haven and the *de novo* charter route has never been attempted in Connecticut and would require the organizers to make false statements if they were organizing a state bank (J.S. 56a).

Similarly, with respect to those towns which are "open" to *de novo* branching in Connecticut, entry must be approved by bank regulatory officials who apply objective standards based on population and income. Testimony by the Regional Administrator of National Banks established that a number of public interest criteria are taken into account in the Comptroller's determination whether to approve or disapprove a new branch. One of the principal standards in this process is the capacity of a particular community to support an additional banking facility; in short—the need for a new branch (J.S. 37a-40a).

Just as most "closed" towns in Connecticut consist of major population centers or medium-sized cities where the head office of a commercial bank is located, most "open" towns consist of suburban or rural areas without high densities of population. Thus, of Connecticut's 128 "open" towns, 41 had no commercial bank offices in 1972. These

towns average 2,600 in population, a level which experience shows has not attracted any of the state's 64 commercial banks even to *seek* entry, whether or not the Comptroller, or the State Bank Commissioner and the FDIC would approve the application. In contrast the average population per branch office in all "open" towns with one or more commercial bank offices was 5,633 in 1972 (J.S. 37a).

Clearly, an application to enter any town by *de novo* branching in circumstances where the addition of one office would result in a ratio of population per banking office significantly below the state average presents a formidable burden on the applicant to establish need and to convince the regulator that the community has the capacity to support the additional facility (J.S. 37a).

The District Court found that the addition of a single office in many of the "open" towns where one or the other of the appellee banks maintains an office would reduce the population per banking office to a point significantly below the state average (J.S. 38a-39a). In those "open" towns where neither of appellee banks is represented, it would, of course, require approval of *de novo* branches of *both* banks before any future competition would develop. The addition of two new branches in many more of these "open" towns would not only reduce the population per branching office below the state average, but even below the 2,600 threshold level at which, on average, *no bank* has been attracted to enter. Lack of economic opportunity in such case (the expectancy of a low level of return on invested capital) can thus be deemed either a barrier to entry or simply a lack of inducement to enter.

In either event, it was not the appellee banks' burden to show that it is probable they would not enter such open towns, but rather the appellant's burden to show that it is reasonably likely that the legal, regulatory and economic

inhibitions to entry in the open towns would likely be surmounted by both appellee banks. The appellant did not carry that burden and offered no objective evidence on the subject.

Even if entry into some of these open towns by both of the appellee banks seemed to be a possibility, contrary to the evidence, the question remains whether that possibility can have any competitive impact in light of the number, size and location of other banks which are, by objective criteria, *more* likely entrants into a given area.

Thus, if it can be shown that in ten years time, given projected population growth, a town could arguably support two more branch offices, the removal of one of the merging banks as a potential entrant cannot have any discernible effect on competition if there are in fact at least three more likely entrants ranked by size and geographic proximity. To test this hypothesis, Dr. Peck prepared tables (DX-27) for all 165 "open" and "closed" towns in Connecticut (affected by the consolidation as areas of potential entry)[18] ranking appellees according to deposit size and geographic proximity to the town in question among the ten leading potential entrants.[19]

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18. See n. 14 (J.S. 29a).

19. Dr. Peck testified that his analysis of potential competition took into account five of the six objective factors listed in appellant's answer to Defendants' Interrogatory 18, namely size, financial resources, demonstrated willingness to expand by *de novo* branching and/or merger with smaller banks, incentive to enter indicated by significant economic growth of the markets involved and geographic proximity. He testified that he did not take into account the sixth factor, "economic similarity of the markets", since he "wasn't sure exactly what this element was or how it would be quantified" (Tr. 1236). A high degree of rank correlation was found among the first three factors of size, financial resources and demonstrated willingness to expand (Tr. 1233-1237). Ample factual basis was found by the District Court to support the opinion of the banks' expert witness that the town is the appropriate unit of analysis of potential competition.

Dr. Peck's study was based on the fact that branching laws in Connecticut are written around towns, rather than some other unit, and result in towns being either "open" or "closed", and on the recognized fact that convenience plays a major role in the banking industry.[20] The starting point for assessing the effect of a bank consolidation on potential competition accordingly is the smallest geographic unit to which legal barriers to entry attach. This analysis demonstrated that the proposed consolidation does not eliminate the most likely entrant, ranked by size, into any "open" town in Connecticut (J.S. 30a) and that generally, ranked by both criteria of size and proximity, the bank affected by the consolidation does not even rank among the top ten most likely entrants (J.S. 31a).

The District Court found that *in no case would there be less than four firms identified by appellant as having statewide capabilities left as potential entrants.* In those few towns where either merging bank ranks among the top ten potential entrants, the District Court found that, even in terms of projected 1980 population, there is no prospect that these towns could support more entrants than the number of banks ranking ahead of appellee banks by size and proximity (J.S. 38a-40a).

In summary, appellant's burden of proof to show some likelihood of potential competition between appellant banks throughout the state cannot be carried merely by showing that certain towns or metropolitan areas in Connecticut are enjoying good economic growth. A burgeoning town of 30,000 may well be "overbanked" from the vantage point

20. "A banker in Woodbridge, for example, would not be concerned with a new entrant into Guilford, even though the two towns are in the same SMSA. The reason is simple; the driving time between the two towns is over 45 minutes and there are seven banks with 39 offices in the intervening towns between Woodbridge and Guilford" (Tr. 1239, 1347); (J.S. 28a).

of an outside bank or a regulatory official if there are already six or seven commercial or savings bank offices serving the area. The obstacles to new entry in such a case are substantial and the necessary regulatory approval less than assured. Moreover, the competitive significance of removing only one of many potential entrants into a banking market (which has never been empirically established by economic research) was not even addressed by appellant.

With Bridgeport and New Haven both closed to *de novo* branching, appellant's case consists of no more than an invitation to speculate on the ways these two banks might structure future moves to overcome those two inconvenient facts. The means suggested are (1) by engaging in major *de novo* branching programs into the "open" towns, (2) "foothold" acquisitions or (3) holding company affiliations through newly chartered banks. Each of these alternatives was shown by appellees' evidence and found by the District Court to be either unavailable or subject to clear regulatory veto, or both, and inconsistent with the merging bank's economic motivations.

Professor Peck did not express any opinion on the likelihood of entry by either bank or the competitive weight to be given the "wings" effect. Instead, he analyzed the effect of the proposed transaction on potential competition *as though* it were important here, i.e., assuming that appellant had proven the likelihood of entry, that there was a "wings" or "perceived" effect and that competition from savings banks should be ignored—all contrary to the record. In this way, Professor Peck's analysis focused directly on appellant's ultimate argument—that the proposed consolidation would be likely to result in a significant change in the structure of potential competition in commercial banking in the State of Connecticut.

The analysis on which the conclusion was reached did not take into account the competitive impact of savings banks in Connecticut or the subjective expressed intent of any banking officials. The District Court found that Professor Peck:

> ". . . limited his survey solely to commercial banks. He did not take into account the presence of savings banks; thus, it is evident that his conclusions would be strengthened if the competitive effects of savings banks had been considered" (J.S. 29a).

His conclusion that the merger would not adversely affect the structure of potential competition among commercial banks in Connecticut and the objective factors on which that conclusion was reached were adopted by the District Court (J.S. 28a, 99a). Appellant offers no persuasive reason to review these factual issues here.

With full cognizance of the criteria to be applied in potential competition cases—capacity and incentive of the merging banks to undertake *de novo* entry, the perceived competitive effects on the fringe of the market, barriers to entry, the number and strength of remaining potential entrants, the rank of the potential entrants, the rank of the potential entrants affected by the merger and the structure and trends within the market—the District Court took pains to apply all of the relevant legal standards to the facts on record. He found appellant's proof fell short.

He need not have gone on to weigh the needs and convenience of the community because he found no violations of the Clayton Act.

SECTION OF THE COUNTRY

Appellant contends that the District Court erred in finding that the State of Connecticut as a whole was the only relevant section of the Country within which to analyze the competitive effects of this merger. Appellant argues that "the New Haven and Bridgeport areas are also relevant sections of the country" (J.S. 14).

The District Court found to the contrary based in part on appellant's own evidence. Appellant sought to demonstrate that the nine Connecticut Standard Metropolitan Statistical Areas, as defined by the Office of Management and Budget, were the appropriate geographic banking markets in this case.[21] The cities of New Haven and Bridgeport are both the focal points of separate SMSA's, but under Connecticut banking law each of these cities is treated as a unit for home office protection purposes, while the SMSA has no legal significance. The SMSA as a "market" concept was essential to appellant's potential competition theory, however, because it had to show, as a threshold to proving its allegations, at the least, that one of the two merging banks is one of the most likely entrants into the other's market. Since both New Haven and Bridgeport are closed to *de novo* branching by banks headquartered outside those cities, appellant must argue that entry into any town in the SMSA would constitute entry into the principal market of the resident bank. Its only witness to so testify admitted that his familiarity with the geographic area consisted of attending "a couple of Yale football games."[22] The

21. Appellant also sought to demonstrate that a "four-town area" consisting of Orange, Derby, Ansonia and Milford constituted a section of the country. Its own expert witness, however, did not agree that this was a banking market and appellant has now abandoned that contention (J.S. 4).

22. The locale was in the City of New Haven as well as in the New Haven SMSA (Tr. 312).

District Court, understandably, did not accept this testimony nor did the District Court find persuasive his and appellant's contention that the town of Woodbridge, a small semi-rural community in the New Haven SMSA, could constitute a meaningful toehold entry for Connecticut National to compete in the City of New Haven.

Appellant's principal evidence in support of its contention that SMSA's are *ipso facto* sections of the country within the meaning of Section 7 of the Clayton Act in a bank merger case was the testimony of Dr. Frederick Glantz who described the manner in which SMSA's are delineated. Dr. Glantz, who conceded his lack of expertise in banking and who made no analysis of competition or banking markets in this case, admitted that the definition of SMSA's did not include consideration of any banking data and was not developed as a tool for analyzing banking markets (J.S. 18a). Dr. Murphy, who was offered by appellant as an expert on bank competition, agreed that Stamford and Norwalk (separate SMSA's) and New York City might all be part of the same banking market (J.S. 25a).

The Department of Justice in its report to the Comptroller of the Currency on this merger did not use the SMSA concept in discussing competitive effects but relied instead, as appellees did at trial and as they do here, on the town as the unit of analysis and the State of Connecticut as the relevant geographic market (J.S. 19a).

This Court in *Philadelphia, supra,* at the urging of appellant, specifically rejected the eight county Delaware Valley area, which comprises the Philadelphia, Pennsylvania-New Jersey SMSA, as the appropriate section of the country. 374 U.S. at 357. The Court below had stated that "at the very least it (the section of the country) must include the entire Delaware Valley." 201 F. Supp. 348, 364 (E.D. Pa. 1962). Appellant contended in this Court that that was error.

Appellant argued in this Court in *Phillipsburg, supra,* that the SMSA was not the appropriate section of the country in which to evaluate the competitive effects of the proposed merger of Phillipsburg National Bank and Trust Company and Second National Bank of Phillipsburg. There the SMSA included Lehigh and Northampton Counties in Pennsylvania and Warren County in New Jersey. But the Department of Justice argued that Phillipsburg-Easton, a smaller area, was appropriate and this Court accepted that argument. Appellant argued that the District Court in that case erred when it "stressed the economic and social integration among the population and other businesses in the larger merchandising area that it viewed as the only appropriate geographic market" (in other words, the SMSA).[23] Appellant now contends that the District Court in this case should have done what it contends was error on the part of the District Courts in the *Phillipsburg* and *Philadelphia* cases. The United States, even as an advocate, should not be allowed to shift course so blithely to accommodate the exigencies of its case.

As this Court has pointed out: "While there is undoubtedly some commercial intercourse between smaller communities within a single *'standard metropolitan area,'* the most intense and important competition—will be confined to—the particular communities in such an area and their immediate environs." (emphasis added) *Brown Shoe Co., supra,* at 339.

Appellees' position in this case follows that view of this Court as expressed by Chief Justice Warren. The town or community is the appropriate unit for analysis of the competitive effect, particularly where, as here, home office protection varies by town. The state as a whole is the relevant "section of the country" within which to appraise

23. Brief for Appellant at 32-33, *Phillipsburg, supra.*

any effects because, subject to home office protection, that is the area "which state law apparently recognizes as a meaningful banking community in allowing . . . banks to branch within it . . ." *Philadelphia, supra,* at 361.

Appellant demonstrates some uncertainty in determining which geographic area to select to maximize its opportunity to find some anticompetitive effect resulting from this merger. On the one hand its argument that the SMSA is the relevant banking market requires it to concede that the two banks are in separate markets and not in significant competition with each other. On the other hand it argues that this Court's decisions in ordinary horizontal competition cases are controlling here. Appellant cannot deny that each bank is now prohibited by law from branching into the town in which the other has its head office, New Haven and Bridgeport, respectively. It asserts that 82.7% of the 146,596 workers living in the Bridgeport metropolitan area and 88.7% of the 129,810 workers living in the New Haven metropolitan area work in the area where they live. These figures alone demonstrate, since, as appellant argues, "banking is a business in which the geographic market is particularly affected by convenience of location to the customer who is neither very large nor very small" (J.S. 17, 18), that the two banks are not in significant existing competition with each other and that this Court's decisions in horizontal merger cases do not apply.

Appellant then turns to the State of Connecticut as a whole. As appellant concedes "under this horizontal analysis (using the state as a whole) neither of the merging banks could have competitive significance as a potential entrant in the principal operating area of the other" (J.S. 14).

Appellant argues nevertheless, that this Court's decisions in *Philadelphia, supra, Phillipsburg, supra, United States*

v. *Von's Grocery Co.*, 384 U.S. 270 (1966) and *United States* v. *Pabst Brewing Co.*, 384 U.S. 546 (1966), establish a *per se* rule of illegality based on the conclusion that the combined banks would have 11.3 percent of the market.[24] But in *Philadelphia, Phillipsburg, Von's* and *Pabst* the merging parties were in substantial direct competition with each other. In *Philadelphia* the head offices of the two banks were across the street from each other and the banks competed throughout the four-county area within which both were limited by state law in branching and merging.

In *Phillipsburg* the merging banks were direct competitors.

> "PNB and SNB are direct competitors. Their main offices are opposite one another on the same downtown street. SNB's only branch is across a suburban highway from one of PNB's two branches." 399 U.S. at 354.

This Court's decision in *Von's* also involved two firms in direct competition with each other. Mr. Justice White described the two firms as *"substantial competitors"* and observed that "[T]he merger not only disposed of a *substantial competitor* but increased the concentration in the leading firms." 384 U.S. at 281 (emphasis added). Not only are Connecticut National and First New Haven not "substantial competitors" but the merger by definition would not increase concentration in either of the two claimed banking markets on which appellant offered its proof in the District Court. There would be no increase in the concentration ratios in the Bridgeport or New Haven

24. As we discussed earlier, appellees' combined share of deposits held by Connecticut-based commercial banks was only 10.3% at year-end 1972 and when reduced by *proven* Connecticut business obtained by New York banks and divestiture would be approximately 8.8%.

SMSA's following the merger and, in fact, there would be a decrease, due to the decision by the two banks to sell six branches to new entrants.

Appellant's citation of *Pabst, supra,* is also inapposite. There this Court said "The merger of Pabst and Blatz brought together two very large brewers competing against each other in 40 States. In 1957 these two companies had combined sales which amounted to 23.95% of the beer sales in Wisconsin, Illinois and Michigan and 4.49% of the sales throughout the Country." *Pabst, supra,* at 551.

Cases holding unlawful mergers between companies which are direct competitors throughout their market areas have no application to this case where appellant has stated the principal question presented to be whether Section 7 is violated "by eliminating the two banks as significant potential entrants into each other's markets in Bridgeport and New Haven and into local banking markets in Connecticut" (J.S. 2).

This case is a potential competition case by the appellant's allegations in the complaint, its proof at trial and its statement of the questions presented. In such a case market share figures taken from horizontal merger cases are largely irrelevant.

The District Court found correctly that the Bridgeport SMSA does not comprise Connecticut National's relevant banking market, relying in part on the fact that only 57% of Connecticut National Bank's deposits originated from towns in the SMSA. The District Court concluded that Connecticut National's market was the area within which it had established branch offices (J.S. 20a).[25] That area consisted of 25 towns in Fairfield, New Haven and Litchfield Counties. The District Court found the SMSA concept

25. *Cf. Philadelphia* at 361, where the Court noted that the area where the banks had branched was the area of effective competition.

"particularly useless in New England where banking organizations have offices and derive substantial deposits beyond the boundaries of the SMSA where their head offices are located" (J.S. 20a). He observed that the three federal bank regulatory agencies define a bank service area as the geographic area from which the bank derives 75% of its deposits (J.S. 20a). The service area, as so defined, extends beyond the Bridgeport SMSA in the case of Connecticut National to the west to the New York border, encompassing the Stamford and Norwalk SMSA's, and in the case of First New Haven extends beyond the New Haven SMSA to the east, nearly to New London.

Appellant argues that the District Court's definition of the market was erroneous because it was seller oriented. But appellant also argues (J.S. 21) that "although the State of Connecticut is not a commercial banking market in the customer-supplier sense described in *Philadelphia National Bank*, it is nevertheless a 'section of the country' for determining the effect of the merger on competition."

In assessing the competitive effects of a bank merger in Connecticut, evaluation of the impact of New York City based banks is inescapable. The State of Connecticut is directly contiguous to Westchester County in New York State where banks headquartered in New York City are permitted by state law to branch. New York City headquartered banks have numerous offices throughout Westchester County and obtain banking business from Connecticut, both on the retail level from the substantial number of commuters who cross state lines and on the commercial level from the active solicitation of customers in Connecticut (J.S. 24a-27a).

Appellant's expert banking witness, Dr. Murphy, agreed that commuting patterns and the substantial competitive interaction between New York City and Southern Con-

necticut, supported the conclusion that substantial competition exists for banking business in Connecticut from New York City banks. Appellant's evidence showed that approximately 50,000 heads of households commute into Connecticut from New York or *vice versa* in approximately equal numbers and showed that this was part of an increasing trend of cross-commutation. The evidence established that in Fairfield County, where Connecticut National is headquartered, the daily circulation of *The New York Daily News* was 44,058 copies and *The New York Times*, 29,360 copies. The circulation of each of these New York papers exceeded the circulation of Fairfield County's only morning daily, *The Bridgeport Post Telegram*, which averaged 11,521 copies, and combined amounted to approximately six times as much. The evidence showed that New York banks advertise heavily on television, which saturates Fairfield County, in the newspapers and in the railroad stations. The competitive impact in Connecticut of the advertising of rates on savings deposits and rates charged for loans by New York banks was found by the District Court to be substantial (J.S. 25a).

In a survey which covered only a part of the banking business obtained by but six of the over 70 New York City area banks, it was established that over $480 million in Connecticut based deposits were held in over 23,000 accounts by these New York City banks. The survey also showed that six New York City commercial banks alone obtain over $381 million in commercial and industrial and mortgage loans from Connecticut customers. These figures do not include banking business obtained from Connecticut by 64 other commercial banks headquartered in the New York City area or the business obtained from Connecticut by New York City and Westchester savings banks.

Appellant apparently agrees with the District Court's finding that the state as a whole is an appropriate section

of the country in which to assess the competitive effects of this merger (J.S. 21), but as in the case of savings banks, it would ignore the reality of existing competition from New York banks in pursuit of its potential competition theories.

LINE OF COMMERCE

The discussion of potential competition has dealt with the issues on appellant's terms—namely, that the line of commerce should be limited to commercial banking and that existing competition from savings banks should be ignored, although savings banks have more total deposits in Connecticut than do commercial banks and compete for over 75% of the loan business which commercial banks do in Connecticut and by the end of 1975 will compete with commercial banks for all retail banking business.

It is appellees' view that this Court's opinions in *Philadelphia* and *Phillipsburg* do not require a District Court to ignore competition where competition in fact exists. Appellant's banking economist has stated that "some reconsideration of the commercial bank product line specifications may be in order" since *Philadelphia* was decided by this Court because of "increased competition among commercial banks and thrift institutions for savings type liabilities in the 1960s." (DX-58). This statement is in accord with appellees' view and does not imply that *Philadelphia* was incorrectly decided. The reality is that the extent of competition between commercial banks and savings banks has drastically changed since the close of the record in the *Philadelphia* case in 1962. Nowhere has the intensity of such competition become more severe than in Connecticut. Even if this case involved two commercial banks headquartered in Bridgeport—the kind of direct

competition which existed in Philadelphia and Phillipsburg —it would be unrealistic to ignore the fact that savings banks in Connecticut are now strong competitors and will compete for all retail banking customers (over 90% of appellees' accounts) by 1975.

At trial appellant failed to offer any proof on the line of commerce issue, reflecting its view that it is no longer necessary in any bank merger case to consider the size, scope or functions of competing sources of financial services in light of this Court's decisions in *Philadelphia* and *Phillipsburg*.

However, no decision of this Court has directed lower courts to totally ignore *existing* competition from financial institutions other than commercial banks in evaluating the importance of *potential* competition in a commercial bank merger case. Appellant argues here that this Court should declare unlawful a merger which it alleges, but failed to prove, may eliminate *potential* competition between the two banks while asking the Court to ignore proven *existing* competition which both banks now encounter from savings banks for over 75% of their loan business. Even if this Court should find that commercial banking is the appropriate line of commerce in this case, contrary to what the evidence has established, it would be illogical and at odds with the Court's prior decisions to ignore the impact of savings bank competition on competitive behavior *within* a commercial banking line of commerce.

In this appeal, the Court is being asked by appellant to speculate that appellees will find their way around the law and policy of the State of Connecticut and enter each other's markets at some time in the future, contrary to the record and the findings of the District Court. It asks the Court to conclude that the effect of the elimination of that possibility "may be substantially to lessen *competition*, or

to tend to create a monopoly" while at the same time it asks the Court totally to ignore retail banking competition where it now exists merely because it goes under a different name. To do so would be almost as unrealistic as ignoring competition between national banks and state banks merely because they operate under different supervisory agencies and may have somewhat different powers. This Court has refused to follow similar suggestions in prior cases such as *United States* v. *Continental Can Co.*, 378 U.S. 441 (1964).

The record is clear that savings banks in Connecticut are direct competitors of commercial banks for time and savings deposits, personal loans and real estate loans as well as for branch sites and personnel (J.S. 11a). By year-end 1975 they will be able to accept demand deposits and hold personal checking accounts. Appellant's expert witness agreed that such competition exists (J.S. 12a). Of the merging banks' total IPC deposit accounts, over half presently consists of accounts for which Connecticut savings banks are direct competitors (DX-35, Tables 1-6). Appellant admits that over three-quarters of appellees' total loan portfolios consists of personal and real estate loans obtained in direct competition with Connecticut savings banks (J.S. 16, n. 21).

Total deposits of Connecticut savings banks at year-end 1971 amounted to $6.1 billion, substantially in excess of the total deposits of Connecticut commercial banks—$5.7 billion at the same date (DX-62; GX-70). Two of the state's savings banks, moreover, are larger than all but the two dominant Hartford commercial banks and are larger than either of appellee banks (DX-52, p. 15; GX-70).

With these facts on record, it is instructive to compare the data available to the District Courts and to this Court in the *Philadelphia* and *Phillipsburg* cases which led to the

conclusion that the cluster of products and services offered by commercial banks in Pennsylvania and New Jersey comprised a distinct line of commerce.

For Pennsylvania as a whole, commercial banks held $13.7 billion of the $15.7 billion held by all Pennsylvania commercial and savings banks.[26]

Based on figures for mid-year 1960[27] (the period on which the trial record in *Philadelphia* was built) commercial banks held $4.5 billion of the $6.3 billion of total deposits of commercial banks and savings banks in the four-county area adjudged the relevant geographic market in *Philadelphia* and savings banks in Philadelphia did not make personal loans and did not offer checking accounts.

In the Phillipsburg-Easton area, held to be the relevant geographic market in *Phillipsburg, no* savings bank competition existed as of June 29, 1968, while total commercial bank deposits in the Allentown-Bethlehem-Easton metropolitan area were reported by the FDIC to amount to $1.1 billion at the same date. For the State of New Jersey as a whole, commercial banks held $12.2 billion of the $14.7 billion in deposits of all state commercial and savings banks in June, 1968.[28]

The relative immunity from savings bank competition described in the *Philadelphia* case is totally inapplicable to Connecticut. Defendants' Exhibit 52, "National Fact Book of Mutual Savings Banking, 1972", at Table 62 (page 46), shows that savings banks in Connecticut realized net

26. Federal Reserve Board, *Distribution of Bank Deposits by Counties and Standard Metropolitan Areas,* December, 1960.

27. *Id.*

28. Federal Deposit Insurance Corporation *Summary of Accounts and Deposits in all Commercial Banks,* New York FDIC District; *id.* Philadelphia FDIC District, June 29, 1968; *Summary of Accounts and Deposits in All Mutual Savings Banks,* FDIC, June 29, 1968.

gains in savings of $4.77 billion from 1950-1971 as compared to net gains of $1.86 billion in savings at Connecticut commercial banks. This fact demonstrates that savings banks have been nearly three times as effective as commercial banks in competing for new savings deposits during this period.

In none of the cases decided since *Philadelphia* have savings banks occupied a position comparable to that in Connecticut where they have more deposits and loans than commercial banks and where they compete directly for the bulk of commercial banks' deposit and loan business. Accordingly, the record amply supports the conclusion that "banking" in Connecticut is the relevant line of commerce—including savings banks as well as commercial banks.

The differences between banking market realities today and those under analysis in *Philadelphia* and *Phillipsburg* led appellant's chief witness to conclude that since this Court's decision in *Philadelphia*, economic evidence indicates a change in the amount of competition between savings banks and commercial banks (Tr. 211). He stated in the Summer 1971 *Journal of Bank Research* at page 18:

> ". . . That is, even if an analysis of competition in each bank activity was undertaken in the years prior to the Supreme Court decision [in *Philadelphia*] the evidence over that period does not strongly support the hypothesis that commercial bank time and savings deposits were close substitutes for MSB [Mutual Savings Bank] deposits and S&L shares. Thus, the Court's finding was not inconsistent with the statistical evidence of the 1950s. However, increased competition among commercial banks and thrift institutions for savings-type liabilities in the 1960s suggests that some reconsideration of the commercial bank product line specification may be in

> order. This is especially important if MSBs are successful in obtaining the demand deposit privilege in several of the states in which they are permitted to operate and S&Ls make use of the capability to make third-party transfers" (DX-58).

Thus even if the issue in this case were the elimination of actual competition, the record below justifies the conclusion that the appropriate line of commerce in which to assess the effects of the proposed merger would be "banking", including savings and commercial banks.

However, this is not an actual competition case, but, as appellant concedes, a potential competition case.

It is now the law in Connecticut that, no later than December 31, 1975, savings banks in Connecticut will have the power to offer personal checking accounts. Thus by 1976 the competitive arena in Connecticut will include savings and commercial banks offering all of the important retail banking services: savings and checking accounts, real estate loans, personal loans for a wide variety of purposes and passbook loans. For almost all retail customers both savings and commercial banks will offer the cluster of services that permits one-stop banking.

Nor can appellant argue that savings banks will not take advantage of their new power to offer personal checking accounts. Two savings bank officials testified at trial that their banks would offer checking accounts if empowered to do so, and one such official stated that his bank had already made extensive studies of how to implement demand deposit services (Tr. 1654, 1946).

To deny the certainty of savings bank competition for personal checking accounts is to deny competitive reality and hence the teaching of this Court which said in *Brown Shoe, supra,* that the relevant product market in a Section 7 merger case "must be drawn with sufficient breadth to

include competing products of each of the merging companies and to recognize competition where, in fact, competition exists." 370 U.S. at 326. Certainly in a potential competition case, logic as well as *Brown Shoe* compelled the District Court to recognize competition where, in fact, competition exists and will exist even more strongly in the immediate future.

By focusing solely on commercial banks' power to make commercial loans and accept commercial demand deposits and neglecting the convenience and banking needs of the far greater number of individual retail customers, appellant urges application of the wrong standard. It is the retail customers whose banking needs are most localized. As appellant has pointed out to this Court, commercial bank services such as "international transactions, commercial loans of more than $1.2 million . . ., student loans and mining loans" are of a type which "necessarily were not important to the great bulk of bank customers in the area, and it is the effect upon the entire market area which determines the validity of the merger" (*Marine* J.S. 22).

The record shows that business borrowers are not confined to New Haven or Bridgeport banks. They are solicited on a regular basis by New York and Boston banks, and, of course, the two dominant Hartford banks compete statewide. The importance of potential competition between the appellee banks would be lost on a business borrower in Connecticut with even moderate banking requirements when so many alternatives are available.

Appellant argues that *Phillipsburg* compels a result contrary to that reached by the court below. We disagree. With respect to the appropriate line of commerce, this Court in *Phillipsburg* relied on the immense importance to retail customers of one-stop banking:

> "For some customers, full-service banking makes possible access to certain products or services that

> would otherwise be unavailable to them; the customer without significant collateral, for example, who has patronized a particular bank for a variety of financial products and services is more likely to be able to obtain a loan from that bank than from a specialty financial institution to which he turns simply to borrow money.
>
> "A customer who uses one service usually looks to his bank for others as well, and is encouraged by the bank to do so. Thus, as was the case here, customers are likely to maintain checking and savings accounts in the same local bank even when higher savings interest is available elsewhere. This is perhaps particularly true of banks patronized principally by *small depositors and borrowers for whom the convenience of one-stop banking and the advantage of a good relationship with the local banker—and thus of favorable consideration for loans—are especially important.*" (citations omitted) 399 U.S. at 360-1 (emphasis added).

In Connecticut customers are likely to maintain checking and savings accounts in the same local bank and will do so by year-end 1975 in either a savings or commercial bank. A customer without significant collateral can now turn to either a commercial or savings bank for a personal installment loan. A savings bank in Connecticut is not a "specialty financial institution to which (the depositor) turns simply to borrow money." For the retail customer a savings bank and a commercial bank will be equally useful alternatives to which he can turn for the convenience of one-stop banking and the advantage of a good relationship with the local banker.[29] Indeed full-service retail banking in

29. Contrary to appellant's statement that the record establishes that "savings banks in Connecticut do not compete with commercial banks for commercial loans" (J.S. 16; n.21), DX-20 shows savings banks with $26 million of such loans at year-end 1971 (Tr. 1008-1009).

both commercial and savings banks will be uniquely available to Connecticut's banking public.

It is somewhat anomalous for appellant to argue on the one hand that some of the benefits resulting from a bank merger such as increased lending limits, international transactions, sophisticated computer services and corporate and municipal financing services are "not important to the great bulk of bank customers in the area" because it is "the great bulk of bank customers who make up the community whose convenience and needs the merger is supposed to serve" (J.S. 30-31), while asking this Court to ignore the fact that it is the great bulk of bank customers in the State of Connecticut who are and will be the beneficiaries of the savings and commercial bank competition.[30] For this great bulk of bank customers—the retail bank customers—interchangeability of use and cross-elasticity of demand compelled the District Court to conclude that the appropriate line of commerce includes savings and commercial banks.

In sum, the largest number of purchasers of banking services can or will be able practicably to turn to both commercial and savings banks for supplies. The advent of full service one-stop retail banking at either type of bank correctly led the court below to conclude that 'banking' is the appropriate line of commerce in which to assess the competitive effects of the proposed merger. In any event whether this Court concludes that "banking" or "commercial banking" is the appropriate line of commerce is rela-

30. As appellant's own exhibits (GX-33; GX-48) show, 95% of the demand deposit accounts at the main offices of appellee banks are below $10,000 in size. Clearly, savings banks will be competitive for the bulk of these accounts. Note 24 in the Jurisdictional Statement (J.S. 17) appears to be asking this Court to decide the line of commerce issue on the basis of the dollar volume of accounts held by less than 1% of the account holders at appellee banks' main offices set forth in such exhibits.

tively insignificant in a case where the appellant has failed to prove any of the prohibited effects under Section 7 of the Clayton Act no matter how narrowly or broadly the product market is defined.

CONCLUSION

The judgment of the District Court should be affirmed for the reasons set forth above.

Respectfully submitted,

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